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NO. 445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

AVCO CORPORATION,
Petitioner
v.
AERO LODGE NO. 735; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

J. ALBERT WOLL
General Counsel, AFL-CIO
ROBERT C. MAYER
LAURENCE GOLD
736 Bowen Building
815 Fifteenth Street, N. W.
Washington, D. C. 20005

THOMAS E. HARRIS
Associate General Counsel, AFL-CIO
815 Sixteenth Street, N. W.
Washington, D. C. 20006

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This *amicus* brief is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of one hundred and twenty-nine national and international unions having a total membership of approximately fourteen million, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

A CIVIL ACTION BASED ON THE CLAIM THAT A UNION HAS BREACHED A NO-STRIKE CLAUSE IS REMOVABLE TO THE UNITED STATES DISTRICT COURTS WITHOUT REGARD TO THE REMEDY SOUGHT SINCE THE CLAIM ARISES UNDER FEDERAL LAW AND THE SUIT IS WITHIN THE DISTRICT COURTS' ORIGINAL JURISDICTION

In *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962) this Court recognized that the language and legislative history of Section 301 of the Labor-Management Relations Act of 1947, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958), demonstrate that Congress intended the federal law of collective bargaining agreements to include, as one of its elements, Section 4 of the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 101 *et seq.* (1958) and therefore held that injunctions to enjoin strikes alleged to be in breach of contract, and alleged also to be over a grievance subject to binding arbitration, may not be issued in the federal courts. *See also Teamsters Local 795* v. *Yellow Transit Freight Lines*, 370 U.S. 711 (1962).

The instant case arose when the Petitioner, whose operations affect commerce, brought an action, in a State Court in Tennessee, in which it alleged that the Union representing the employees at its Nashville plant had breached the clause in the applicable collective bargaining agreement stating that the Union would not "cause or sanction . . . work stoppages, strikes, or slowdowns." The Union removed the case to the applicable United States District Court pursuant to 28 U.S.C. § 1441(b) which states:

> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising

> under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

The Petitioner then moved to have the case remanded. This motion was denied and on appeal the Sixth Circuit affirmed the District Court's refusal to remand.

It is, of course, fair to say that the consequences of the decision in *Sinclair* provide the impetus behind this case: If that decision had gone the other way, even the tenuous rationale the Petitioner has constructed to contest removal here would not be available. Moreover, if prior to the instant case this Court had reached the question of whether the *Sinclair* rule applied in Section 301 cases brought in state courts, and had held that it did, it is probable that the proper interpretation of the removal statute would not have become a fighting issue. Nevertheless, we submit that the instant case is not a labor law case in the same sense as *Sinclair*. For *Sinclair* turned on the meaning and interrelationship of two statutes directed solely to labor relations; the instant case on the other hand, while it is contained in the matrix formed by the same statutes, turns on general neutral principles of federal jurisdiction and not on the distinct considerations upon which federal labor policy has been constructed.[1] The application of these principles, as we shall now show, leads to one conclusion, and one conclusion only—that every action based on a claim that a union has breached a no-strike clause in a collective bargaining agreement covering employees engaged in an industry affecting commerce arises under the laws of the United States and is within the original jurisdiction of the United States District Courts. All such actions are therefore removable to the federal district courts.

1. We start from the general proposition that all civil

[1] Norris-LaGuardia is not the only statute which limits the issuance of injunctions by the federal district courts, *see e.g.*, 28 U.S.C. § 2283.

actions whose essence is that there has been a breach of a collective bargaining agreement fall within the overall original federal question jurisdiction of the federal district courts. That is the holding of *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 456-457 (1957):

> "We conclude that the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws . . . Federal interpretation of the federal law will govern, not state law. Cf. Jerome v. United States, 318 U.S. 101, 104. Any state law applied . . . will be absorbed as federal law and will not be an independent source of private rights.
>
> "It is not uncommon for federal courts to fashion federal law where federal rights are concerned. See Clearfield Trust Co. v. United States, 318 U.S. 363, 366, 367. Congress has indicated by § 301(a) the purpose to follow that course here. There is no constitutional difficulty. Article 3, § 2 extends the judicial power to cases "arising under . . . the Laws of the United States . . ." The power of Congress to relate these labor-management controversies under the Commerce Clause is plain. Houston, E. & W. T. R. Co. v. United States, 234 U.S. 342. A case or controversy arising under § 301(a) is, therefore, one within the purview of judicial power as defined in Article 3."

Second, it is equally clear that an action, based on a claim that a union has breached a no-strike clause, in which both damages and an injunction are sought, is not removed from the cognizance of the federal district courts by *Sinclair*. That is the holding of *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), the second of the two decisions this Court rendered in the *Sinclair* litigation. That litigation started in the district court as a single civil action based on a complaint in which both of these remedies were sought. And while the *Sinclair* decision held that the injunctive remedy was not available in the federal courts, in the *Atkinson*

decision this Court concluded that the district court could properly enter a judgment awarding damages.

Third, as *Atkinson* illustrates, the original jurisdiction of the federal courts turns on the nature of the *basic claim* advanced by the plaintiff; it does not turn on the type of relief available or on the disposition of a particular complaint on the merits. Thus original jurisdiction is present if the federal court is competent to act in the general area delineated by the basic claim made by the plaintiff:

> "Frequently the term 'jurisdiction' is loosely used to mean that under the facts of the case a party is not entitled to prevail, and thus, so it is argued, the court lacks power—or 'jurisdiction'—to grant the relief sought. Such usage is incorrect, and leads only to confusion. The jurisdiction of the federal courts is dependent on the subject matter of the action or the status of the parties to it; it is not dependent on the merits of the case." 1 Barron & Holtzoff, Federal Practice and Procedure (Wright ed., 1960) § 21, p. 85.[2]

As this Court explained in *Montana-Dakota Utility Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951):

> "The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions. Petitioner asserted a cause of action under the Power Act. To determine whether that claim is well founded, the District Court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative. If the complaint raises a federal question, the mere claim confers power to decide that

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[2] In the instant case there are no jurisdictional problems based on the nature of the parties. Therefore throughout our argument we use "original jurisdiction" and "subject matter jurisdiction" interchangeably.

is attacked as unconstitutionally broad and the federal court has jurisdiction of the cause. But *Zwickler* does not hold that a federal court should become involved in a state case where the federal court lacks jurisdiction of the cause.

(2) The *Amicus Curiae* erroneously states, at page 9, that the Congressional purpose evinced by the removal statutes,

> ". . . is clearly to insure that no federal question case is tried in a state court *unless both parties wish to have it tried there.* The removal statute provides the insurance necessary to vindicate the primary position of the federal courts in federal question litigation." (Amicus br., p. 9; emphasis in original)

As this Court knows, no action involving less than $10,000.00, founded on a claim arising under a federal statute is removable no matter how important the federal question unless Congress by specific enactment has waived the jurisdictional amount. Both the plaintiff and the defendant, therefore, are compelled to try such a case in a state court.[35] So the remarks of the *Amicus* about "both parties", and about vindicating "the primary position of the federal courts in federal question litigation" are nonsense.

On the contrary ". . . the general policy of [the removal sections], manifest upon their face, and often recognized by this court, [was] to contract the jurisdiction of the [federal courts]." *Tennessee* v. *Union & Planters' Bank* (1894) 152 U.S. 454, 462, 38 L. Ed. 511. Accord: *Shamrock Oil & Gas Corp.* v. *Sheets* (1941) 313 U.S. 100, 85 L. Ed. 1214 (cited on pp. 33-34 of Petitioner's principal brief). "It is said that the trend of the decisions is to restrict and limit the removal jurisdiction of the federal courts. Certainly there is ample case support of the propo-

[35] Charles Dowd Box Co. v. Courtney, *supra* (1962) 368 U.S. 502, 508, n. 4, 7 L. Ed. 2d 483.

sition that removal statutes will be strictly construed." 1 Barron & Holtzoff, Federal Practice and Procedure (1960 Ed.) Section 101 at p. 460.

A fair construction of the statutes involved would not allow subversion of Congressional intent manifested in 1947 to make "no change in the existing anti-injunction provisions . . ." [36] and to "supplement, the thoroughly considered jurisdiction of the various states over contracts made by labor organizations." [37]

CONCLUSION

The Respondents have argued that, "Resistance to removal stems exclusively from this Court's decision in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 . . ." (Resp. br., pp. 11, 44) They should have drawn a line through the first two words. But for *Sinclair*, there is little reason to believe that the Respondents would have attempted the removal. And if they had not done so, this Petitioner would have had nothing to "resist." But this Court's decision in *Sinclair* has been misread by the Respondents. Actually, *Sinclair* is a holding in favor of the Petitioner's contention, because the Court there construed Norris-LaGuardia literally. As so construed, the Act necessarily applies only to federal courts. It has not applied in the past, and in the absence of amendment, cannot apply in the present or future to state courts. Also, construing "jurisdiction" literally closes the door of federal courts to removal of state court suits seeking injunctive relief against strikes in breach of contract.

For the reasons set forth above, and in its main brief, the Petitioner submits that state courts retain their his-

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[36] Sinclair Refining Co. v. Atkinson, *supra* (1962) 370 U.S. 195, 207, 8 L. Ed. 2d 440.

[37] Dowd Box, *supra* (1962) 368 U.S. at 511.

toric jurisdiction to enjoin strikes in breach of contract, that a civil action filed in a state Chancery Court seeking such relief is not founded on a claim or right arising under the Constitution or laws of the United States, and that it is not an action "of which the district courts have original jurisdiction."

Injunctions are the only effective remedy against "wildcat" strikes in breach of contract. Their availability to management strengthens the hand of responsible union leaders who want to keep contract promises and maintain labor peace during the contract term. In this era of economic interdependence, the continued availability of this form of specific performance is essential for the protection of employers, responsible employees, and the consuming public. Without injunctive relief whole cities can be paralyzed. Certainly our system of compulsory collective bargaining assumes and requires full performance of collective agreements. Only state court injunctive relief can assure such performance.

The judgment of the court below should be reversed and the cause should be remanded with directions to reverse the judgment of the United States District Court for the Middle District of Tennessee, Nashville Division, reinstate the injunction improvidently dissolved by that court, and remand the cause to the Chancery Court for Davidson County, Tennessee, from which it was removed by the Respondents. The Petitioner also prays that it have its costs expended herein.

Respectfully submitted,

FRANCIS J. NAPHIN
WARREN G. SULLIVAN
DON A. BANTA

105 West Adams Street
Chicago, Illinois 60603

WILLIAM WALLER
ROBERT G. MCCULLOUGH
1200 American Trust Building
Nashville, Tennessee 37201

JOHN B. HOLLISTER
J. MACK SWIGERT
603 Dixie Terminal Building
Cincinnati, Ohio 45202

Attorneys for Petitioner

M. A. MCLAUGHLIN
750 Third Avenue
New York, New York 10017

Of Counsel

SUPPLEMENT TO APPENDIX A

Statutes Involved

Section 10 of the Labor Management Relations Act, 1947 (29 U.S.C. § 160 (1964), 61 Stat. 146) provides in pertinent part:

§ 10. Prevention of unfair labor practices.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That

no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

* * * * *

Section 5 of the Conformity Act of 1872 (Act of June 1, 1872, ch. 255, 17 Stat. 197) provides:

* * * * *

Sec. 5. That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in

like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: *Provided, however*, That nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.

* * * *